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IN THE

Supreme Court of the United States

WORLDCOM, INC.,

Petitioner,

v.

WISCONSIN BELL, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Telecommunications Act of 1996 ("Act") aims to open historically monopolized local telephone markets to competition. Sections 251 and 252 of the Act establish a procedure under which incumbent local telephone carriers and competing local carriers attempt to negotiate contracts, known as "interconnection agreements," to establish terms and conditions under which the incumbent carriers will provide services to the competing carriers. If negotiations fail to produce a complete agreement, the Act provides that the governing state regulatory commission may arbitrate any unresolved issues. The completed interconnection agreement is subject to approval by the governing state commission.

The question presented is whether the Act's interconnection agreement procedure is exclusive, and thus preempts state laws that advance the Act's pro-competitive goals by empowering the state regulatory commission to require incumbent carriers to make services available to competing carriers via tariffs.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in this Court are WorldCom, Inc., Wisconsin Bell, Inc., and Ave M. Bie, Robert M. Garvin, and Burneatta Bridge, in their official capacities as Commissioners of the Public Service Commission of Wisconsin.

Pursuant to Supreme Court Rule 29.6, petitioner WorldCom, Inc. states as follows:

WorldCom, Inc. (a publicly-held corporation), through its wholly-owned subsidiaries, provides local and long-distance telecommunications services domestically and internationally. WorldCom, Inc. has no parent corporations. No publicly held company owns 10% or more of WorldCom, Inc.'s stock. WorldCom, Inc. owns controlling interests in Embratel Participacoes S.A. and Digex, Incorporated, both of which issue shares to the public.

WorldCom, Inc. and various of its subsidiaries have filed voluntary petitions under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, in the United States Bankruptcy Court for the Southern District of New York. Proceedings regarding WorldCom's petition and the petitions of its subsidiaries are being jointly administered under case number 02-13533-ajg. WorldCom, Inc.'s stock was previously listed on the Nasdaq National Market under the symbols "WCOM" and "MCIT" before WorldCom's bankruptcy filing.

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

WorldCom, Inc. ("MCI") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 340 F.3d 441, and is reprinted at Pet. App. 1a-18a. The opinion of the district court is reprinted at Pet. App. 20a-34a and is not reported. The order of the Public Service Commission of Wisconsin is reprinted at Pet. App. 37a-75a and is not reported.

JURISDICTION

The judgment of the Seventh Circuit was entered on August 12, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Telecommunications Act of 1996 ("1996 Act" or "Act"), Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151-276, as well as certain provisions of Wisconsin state statutes. The relevant provisions of the Act are reprinted at Pet. App. 88a-104a. The relevant provisions of Wisconsin state statutes are reprinted at Pet. App. 104a-107a.

STATEMENT OF THE CASE

This petition seeks review of a divided decision of the Seventh Circuit that conflicts with prior decisions of the Sixth and Tenth Circuits, as well as decisions of the Federal Communications Commission ("FCC"). At issue in this case is an order of the Public Service Commission of Wisconsin ("Commission") implementing Wisconsin statutes that require respondent Wisconsin Bell, Inc. ("SBC") to make certain services available to MCI and other competing local carriers in Wisconsin via tariffs. By a 2-1 vote, the Seventh Circuit panel held that such state tariffs were preempted by the provisions of the 1996 Act that allow new entrants such as MCI to invoke a negotiation and arbitration procedure to gain access to elements of the incumbent local carriers' networks.

In so holding, the panel majority acknowledged its disagreement with a prior decision of the Sixth Circuit in

Michigan Bell Tel. Co. v. MCImetro Access Transmission Servs., 323 F.3d 348 (6th Cir. 2003), a case involving Michigan affiliates of MCI and SBC. In *Michigan Bell*, the Sixth Circuit held that the 1996 Act did not preempt an order of the Michigan Public Service Commission that allowed MCI's Michigan affiliate to purchase services from SBC's Michigan affiliate via state-law tariff. The Sixth Circuit found that "[u]nder the system of cooperative federalism established by the [1996] Act, it is permissible for Michigan to maintain a tariff system alongside the agreements negotiated under the Act." *Id.* at 360. The decision below also conflicts with *U.S. West Communications, Inc. v. Sprint Communications Co., L.P.*, 275 F.3d 1241 (10th Cir. 2002), in which the Tenth Circuit held that allowing competing carriers to take services from incumbent carriers' tariffs is not preempted by the negotiation and arbitration provisions of the 1996 Act. *See* 275 F.3d at 1249-51.

The decision below also conflicts with the FCC's order in *In re Public Util. Comm'n of Texas*, 13 F.C.C.R. 3460 (1997) ("*Texas Preemption Order*"), in which the FCC held that the 1996 Act did not preempt a state tariff as long as new entrants remained free to invoke the Act's negotiation and arbitration provisions. *Id.* ¶ 138-139.

MCI understands that the Wisconsin Commission will soon file a separate Petition for a Writ of Certiorari in this case. The Wisconsin Commission's decision to seek review in this case underscores that review of the Seventh Circuit's decision is a matter of pressing importance. Whether and to what extent the 1996 Act allows state commissions to utilize state-law tariffs as a means of promoting local telephone competition presents an important question of federal law, with significant consequences for the ultimate success of the Act in achieving Congress's goal of fostering local

competition. By its decision, the Seventh Circuit has eliminated an important tool used by state regulators, both before and after passage of the Act, to ensure that new entrants would gain access to network elements rapidly and on reasonable, clear terms. The divided decision below thus represents a severe intrusion on state regulatory authority and imposes substantial harm to the local competition that Congress sought to encourage.

A. The 1996 Act

The 1996 Act was designed to open historically monopolized local telephone markets and offer consumers the benefits of competition "as quickly as possible." H.R. Rep. No. 104-204 at 89 (1995) *reprinted in* 1996 U.S.C.C.A.N. 10, 55 ("H.R. Rep."); *see also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). To that end, Congress preempted all state laws restricting local competition, including the exclusive franchises States had historically granted incumbents to provide local service. 47 U.S.C. § 253.

Congress recognized, however, that merely removing legal impediments to entry would not bring about robust competition, at least in the short term. "[B]ecause the investment necessary is so significant," competitors could not quickly replicate the ubiquitous networks that the incumbents had built over decades under a regime funded by captive customers. *See* H.R. Conf. Rep. No. 104-458, at 148 (1996) *reprinted in* 1996 U.S.C.C.A.N. 124, 160 ("Conf. Rep.").

Congress therefore imposed obligations on incumbent carriers such as SBC that are "intended to facilitate market entry" by competing carriers such as MCI. *AT&T*, 525 U.S.

at 371. "Foremost" among these obligations is the incumbent's obligation to "share its network with competitors." *Id.* Most pertinent here, incumbents must allow new competitors to lease the constituent pieces of the incumbent's network (known as "network elements"), either alone or in combination. *See* 47 U.S.C. § 251(c)(3).

Prices for these network elements are set according to the Total Element Long Run Incremental Cost ("TELRIC") standard established by the FCC. *See Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 497-527, 539 (2002) (affirming FCC's decision to adopt TELRIC pricing standard). TELRIC pricing allows the incumbent carriers to recoup the cost of providing network elements, along with a "reasonable profit." 47 U.S.C. § 252(d)(1); *Verizon Communications*, 535 U.S. at 493.

Along with minimum market-opening requirements, the Act establishes multiple procedures that competing carriers can invoke to implement its substantive requirements. For example, competing carriers can request that incumbents negotiate an "interconnection agreement" to govern the terms under which competing carriers can obtain services from the incumbents. 47 U.S.C. § 252(a)(1). As an incentive to reach voluntary agreement on interconnection terms, the Act allows parties to negotiate provisions "without regard to" many of the Act's substantive requirements. *Id.*

Recognizing that incumbents were unlikely to agree voluntarily to interconnection agreements that threaten their monopolies, Congress gave state commissions the authority to arbitrate all issues not resolved through negotiation. *Id.* § 252(b)(1). Such arbitration may be requested by either the incumbent or the competing carrier 135 days after the initial request for negotiation. *Id.* The resulting interconnection

agreement incorporates all final terms, whether negotiated or arbitrated, and must be submitted to the governing state regulatory commission for approval. *Id.* §§ 252(b)-(c), (e).

When reviewing an interconnection agreement, the state commission may reject any provisions reached through arbitration that are inconsistent with the Act's requirements. *Id.* § 252(e)(2)(B). However, the state commission must approve any provisions in the agreement reached through negotiation, unless the commission finds that the provisions discriminate against other carriers, or that the provisions are inconsistent with the public interest, convenience, and necessity. *Id.* § 252(e)(2)(A). Federal district courts have jurisdiction to review state commission decisions arbitrating and approving the terms of interconnection agreements for compliance with the Act. *Id.* § 252(e)(6).

The negotiation and arbitration mechanisms set forth in the Act are not, however, the sole means for new entrants to get access to network elements. Section 252(i) of the Act, for example, allows competing carriers to take provisions from existing interconnection agreements. *See* 47 U.S.C. § 252(i) (requiring incumbents to make "any interconnection, service, or network element provided under an agreement" available to "any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement").

Competing carriers also can invoke an incumbent's statement of generally available interconnection terms ("SGAT"), if the incumbent carrier has chosen to file an SGAT. *Id.* § 252(f)(1). An SGAT is a statement that an incumbent can file with a state commission setting out "the terms and conditions" that an incumbent "generally offers within that State to comply with the requirements" of the

Act. *Id.* State commissions have authority to review SGATs for compliance with the Act's requirements, and to include additional state-law requirements. *Id.* § 252(f)(2).

In addition to imposing pro-competitive federal obligations on incumbents and establishing these procedures, Congress preserved an independent role for States and state law in fostering local competition. Prior to passage of the Act, several States, including Wisconsin, already had begun implementing pro-competitive initiatives aimed at ending the incumbents' monopolies. *See* 1993 Wis. Act 496 (eff. Sept. 1, 1994).[1] Several of these States sought to open their local markets to competition by requiring incumbents to file tariffs making access to unbundled network elements or services available to potential competing carriers. *Id.*; *see also* n.1, *supra*.

Congress recognized when it passed the Act that such pro-competitive reform was already underway in the States. *See* Senate Rep. No. 104-230, at 5 (1995) ("S. Rep.") (noting that "[s]everal States (such as New York, California, and Illinois) have taken steps to open the local networks of telephone companies"). Congress made clear that it did not intend that the Act displace the States' independent efforts to

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[1] *See also* Mich. Comp. Laws § 484.2357 (1995); Tex. Rev. Civ. Stat. Ann. art. 1446c-0 § 3.453 (West Supp. 1996) (enacted 1995), *recodified at* Tex. Utils. Code Ann. § 60.041 (Vernon 1997); Colo. Rev. Stat. Ann. § 40-15-503 (1995); *Proceeding on Motion of the Commission Regarding Comparably Efficient Interconnection Arrangements for Residential and Business Links*, No. 91-C-1174, 1995 N.Y. PUC LEXIS 710, at *9 (N.Y. Pub. Serv. Comm'n Mar. 1, 1995); *Adoption of Rules on Line-Side Interconnection and Reciprocal Interconnection*, No. 94-0049, 1995 Ill. PUC LEXIS 636, at *15 (Ill. Commerce Comm'n Oct. 3, 1995); *In re Application of MFS Intelenet of Md.*, No. 8584, 1995 Md. PSC LEXIS 261, at *98 (Md. Pub. Serv. Comm'n Dec. 28, 1995).

foster local telephone competition. Rather, as lower courts have recognized, the Act is "an exercise in what has been termed cooperative federalism" between the federal government and the States, *Puerto Rico Tel. Co. v. Telecommunications Reg. Bd.*, 189 F.3d 1, 8 (1st Cir. 1999); *see also Michigan Bell Tel. Co. v. MCImetro Access Transmission Servs.*, 323 F.3d 348, 351 (6th Cir. 2003), "allow[ing] the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981).

Most notably, the Act expressly preserves "any regulation, order, or policy of a State commission" that "establishes access and interconnection obligations of local exchange carriers," so long as the state regulation, order, or policy is "consistent with the requirements of this section" and "does not substantially prevent implementation of the requirements of this section and the purposes of this part." 47 U.S.C. § 251(d)(3). Section 261 similarly allows States to "impos[e] requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the [FCC]'s regulations to implement this part." *Id.* § 261(c); *see also id.* § 252(e)(3) (allowing state commissions to establish and enforce pro-competitive state-law requirements when arbitrating and reviewing interconnection agreements).

Congress also provided that the Act "shall not be construed to modify, impair, or supersede Federal, State, or local law *unless expressly so provided* in such Act or amendments." Act § 601(c), 110 Stat. 56, 143 (1996)

(uncodified note to 47 U.S.C. § 152) (emphasis added). Congress included this clause in the Act in order to "prevent[] affected parties from asserting that the [Act] impliedly pre-empts other laws." Conf. Rep. at 201, *reprinted in* 1996 U.S.C.C.A.N. 124, 215. Collectively, these provisions of the Act confirm what the FCC has independently made clear, namely, that Congress did not intend the 1996 Act "to disrupt the pro-competitive actions some states already have taken[.]" *Local Competition Order* ¶ 62.[2]

B. Pro-competitive Provisions in Wisconsin State Law

Wisconsin was one of the States that had enacted provisions aimed at promoting local telephone competition before Congress passed the 1996 Act. Wisconsin law gives the Commission broad authority to order incumbent carriers like SBC to connect their networks with the networks of competing telecommunications providers. Wis. Stat. Ann. §§ 196.04(1)(b)(2), 196.199(2). Incumbent carriers such as SBC are forbidden under Wisconsin law from refusing to interconnect with competing carriers. *Id.* § 196.219(3).

Wisconsin law specifically empowers the Commission to "approve and enforce interconnection agreements" between SBC and competing carriers. *Id.* § 196.199(2)(a). However, Wisconsin law also requires incumbent carriers like SBC to provide certain services to competing carriers by

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[2] *In re Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 11 F.C.C.R. 15,499 (1996) ("*Local Competition Order*"), *vacated in part on other grounds, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part sub nom. AT&T Corp .v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

filing tariffs. Specifically, Wisconsin law states that incumbent carriers "shall provide access services *under tariff* under the same rates, terms and conditions to all telecommunications providers[.]" *Id.* § 196.219(2m) (emphasis added). "Access service" is defined to include "unbundled local service provided to telecommunications providers." *Id.* § 196.01(1b). Wisconsin law, however, does not provide independent authority for the Commission to "review or set the rates" for access service. *Id.* § 196.196(2)(a).

C. Proceedings Before the Wisconsin Commission

In 1999, the Wisconsin Commission commenced a proceeding to "promote and ensure the development of effective competition in the local exchange telecommunications markets" in Wisconsin. Pet. App. 38a. The Commission required SBC to provide two types of network elements: "UNE-P" and "EELs." UNE-P, or "Unbundled Network Element-Platform," is a combination of several network elements that collectively permit the requesting competing carrier to provide traditional local voice telephone service. Pet. App. 46a. EELs, or "Enhanced Extended Links," are combinations of transport and loop network elements. *Id.*

The Commission found that it had the authority under Wisconsin law to require SBC to offer UNE-P and EELs, and concluded that this authority was not preempted by the 1996 Act. *See* Pet. App. 55a. Instead, in the view of the Commission, the Act preserved the relevant provisions of Wisconsin law as "additional, consistent, pro-competitive state action[.]" Pet. App. 55a-56a.

The Commission also held that, because UNE-P and EELs "qualify as unbundled access" under Wisconsin law, they "must be tariffed by [SBC] pursuant to Wis. Stat. §§ 196.196(2)(a) and 196.219(2m)." Pet. App. 57a. The Commission found that it was necessary to order SBC to provide these services by tariff because, although SBC had purported to offer the services by means of a "voluntary" amendment to its interconnection agreements, "[m]any of the terms and conditions [SBC] has proposed on its 'voluntary' offerings are simply unreasonable or amount to unacceptable overreaching. They either impede the quality or reliability of the offering, or seek to [impose a] throttlehold on [competing carrier] participation in regulatory proceedings." Pet. App. 57a-58a.

The Commission emphasized that, although it was ordering SBC to offer UNE-P and EELs by tariff, it was not eliminating private interconnection agreements or foreclosing reliance on the negotiation and arbitration process presented by the Act. Specifically, the Commission found that, to the extent competing carriers already had interconnection agreements with SBC, the agreements generally remained in effect, and the Order should be treated as "a change of law" under those existing interconnection agreements. Pet. App. 56a-57a. The Commission further noted that "[UNE-P and EELs] can also be sought in new interconnection agreements under §§ 251 and 252." Pet. App. 57a. The Commission also found that its requirement that SBC tariff UNE-P and EELs did not "create a complete regime of state-ordered tariffed interconnection offerings that bypass §§ 251 and 252 altogether." *Id.*

D. Judicial Proceedings

SBC brought suit in the United States District Court for the Western District of Wisconsin to challenge the Commission's Order. Among other things, SBC contended that the 1996 Act preempts the Commission from requiring SBC to make *any* services – including UNE-P and EELs – available to competing carriers outside of the interconnection agreement process. *See* Pet. App. 27a-28a. The district court agreed with SBC and found that the Act preempts the Commission's Order insofar as the Order requires SBC to make services available via tariff. Pet. App. 33a.

The district court acknowledged that the Wisconsin commission did not purport to make tariffs the exclusive means by which SBC was to offer UNE-P and EELs, and that the Commission in fact had held expressly that SBC could provide the combinations through interconnection agreements, pursuant to 47 U.S.C. §§ 251-252. *See* Pet. App. 22a. The district court found, however, that "[b]y forcing [SBC] to file a tariff that any entrant can select unilaterally without having to negotiate an interconnection agreement, the [C]ommission has imposed a requirement that circumvents the interconnection agreement process prescribed under § 252." Pet. App. 30a.

MCI and the Commission both appealed to the Seventh Circuit. After the completion of briefing and oral argument, the Seventh Circuit initially directed the parties to submit supplemental briefs addressing what pricing standard would be applied to the UNE-P and EELs tariffs SBC had been required to file. Pet. App. 4a. All parties agreed that the prices for SBC's UNE-P and EELs tariffs would be determined according to the TELRIC methodology – the

same methodology that would be applied by the Commission in arbitrating interconnection agreements under the Act. *Id.*

Thereafter, by a 2-1 vote, the panel affirmed the district court's decision. Acknowledging its disagreement with the Sixth Circuit's decision in *Michigan Bell*, the majority held that Wisconsin's tariffing requirement is preempted because it "interfere[s] with the procedures established by the federal act." Pet. App. 6a.

The "interference" that troubled the majority took several forms. First, even though the TELRIC pricing methodology to be used in the tariffs is the same that the Wisconsin Commission would use in an arbitration, the majority found that the tariff requirement "places a thumb on the negotiating scales by requiring one of the parties to the negotiation, the local phone company, but not the other, the would-be entrant, to state its reservation price, so that bargaining begins from there." *Id.*

The majority also found that the tariff requirement "complicates the contractual route by authorizing a parallel proceeding." *Id.* The majority believed that the "tariff procedure shortcircuits negotiations, making hash of the statutory requirement that forbids requests for arbitration until 135 days after the local phone company is asked to negotiate an interconnection agreement." Pet. App. 7a.

The majority also concluded that requiring SBC to provide services via tariff could complicate the Act's scheme of federal judicial review of state commission decisions. It believed that "[a]n appeal from the commission's resolution of an entrant's challenge to a tariff would go to a state court, rather than a federal court," and found this to be "a difference that cannot be assumed to be inconsequential."

Pet. App. 6a. It concluded that the "negotiation procedure established by the federal act provides the local phone company with a degree of protection that it would lack if the state commission could, by requiring the company to file a tariff that the commission might invalidate as unreasonable, enable would-be entrants to bypass the federally ordained procedure." Pet. App. 7a.

The majority acknowledged that, as MCI and the Commission argued, "by providing an alternative means of obtaining interconnection, the state's tariff requirement promotes the procompetitive policy of the federal act." Pet. App. 7a. However, the majority pronounced this a "dangerous method of [statutory] interpretation." *Id.* Without referencing any provision in the Act or its legislative history, the majority speculated that this argument would "run roughshod over the compromise between interest groups that enabled the statute to be passed in the first place." *Id.*

Judge Cudahy dissented. He first observed that "the Act makes clear that state regulatory processes are not to be voided unless they can be shown to conflict with federal purposes." Pet. App. 8a. Citing the Act's multiple provisions preserving pro-competitive state law, *see supra*, pp. 8-9, Judge Cudahy noted that "the whole idea that the *method* of negotiation/arbitration is exclusive and preempted has no sound legal basis" because "the Act here does not exclude, but rather specifically embraces, such parallel regulation." Pet. App. 11a (emphasis in original).

In response to the majority's "thumb on the scales" argument, Judge Cudahy observed that the state commission would use the same TELRIC methodology to set prices whether it did so in an arbitration under § 252, or in the

tariff. Therefore, "the § 252 mechanism already contemplates a very similar 'thumb' inherent in its negotiation/arbitration method of interconnection." Pet. App. 12a.

Judge Cudahy also refuted the majority's claim that "a tariffing challenge would go to state court." Pet. App. 13a. He noted that this Court has held that federal district courts have jurisdiction, pursuant to 28 U.S.C. § 1331, over claims that state commissions have violated federal law in decisions other than decisions approving interconnection agreements. *Id.* (citing *Verizon Md. v. Public Serv. Comm'n*, 535 U.S. 635 (2002)). Thus, "insofar as the challenge would concern the state's application of the TELRIC standard in evaluating a tariff, it is likely that the federal courts would have jurisdiction over the matter, just as they would over a challenge to an arbitrated interconnection agreement." Pet. App. 13a-14a.

Judge Cudahy also pointed out that, because SBC's challenge to the tariff requirement was not based on the particular terms of the tariff, but rather on a claim that SBC can *never* be required to make services available via tariff, "what is involved here is simply a facial challenge to the [Commission's] ability to require tariffing under any circumstances. . . . Speculation about possible terms is, therefore, beside the point in this facial challenge. . . the only issue is whether there is any set of facts under which the [Commission] can require tariffing." Pet. App. 15a-16a.

Judge Cudahy also dismissed as "unsupported by the statute" the majority's suggestion that a "careful compromise of interest group positions" intended to afford "protections" to SBC. Pet. App. 14a. Finally, Judge Cudahy concluded that the majority erred by "look[ing] upon the negotiation

phase as providing a purely 'free market' solution as opposed to a regulatory solution." Pet. App. 15a. In Judge Cudahy's view, "this dichotomy simply does not exist here, where all parties are bound to the TELRIC method of rate determination." Pet. App. 15a.

In the end, Judge Cudahy concluded that "[w]hen one strips away the tangential distractions, the majority has ruled that Congress intended there to be only one method to achieve interconnection and establish its terms. The Act does not support this conclusion." Pet. App. 18a.

REASONS FOR GRANTING THE PETITION

The question presented in this case is whether the negotiation and arbitration procedure created by the 1996 Act preempts state laws that utilize tariffing requirements as an additional procedural means to promote local telephone competition. By sustaining SBC's "facial" challenge to the state-law tariffing requirement in this case, the Seventh Circuit's decision has created a clear split among the circuits on this issue. The Seventh Circuit panel majority believed that Congress intended the interconnection agreement process to be the only procedure that States can employ to promote local competition. Pet. App. 5a-7a. It therefore found that the 1996 Act preempts Wisconsin's effort to "create an alternative method by which a competitor can obtain interconnection rights." Pet. App. 2a.

The Sixth Circuit reached precisely the opposite conclusion in *Michigan Bell*. The Sixth Circuit held that, "[u]nder the system of cooperative federalism established by the Act, it is permissible for [states] to maintain a tariff system alongside the agreements negotiated under the Act." 323 F.3d at 360. It found that "the negotiation procedure

under Section 252 of the Act is not the only way for the [state] Commission to order and regulate telecommunications." *Id.* at 359.

The Seventh Circuit's decision also conflicts with a prior decision of the Tenth Circuit, which held that the Act does not preempt state commissions from requiring incumbents to include provisions in interconnection agreements allowing competing carriers to "opt in" to the incumbents' tariffs. *U.S. West Communications*, 275 F.3d at 1248-51.

The majority's decision below also conflicts with the FCC's *Texas Preemption Order,* which found that the Act did not preempt a Texas tariff. Although both Judge Cudahy below and the Sixth Circuit in *Michigan Bell* expressly relied on that FCC decision, the majority entirely ignored the decision in its opinion.

Moreover, the Seventh Circuit's decision is incorrect. The panel majority misinterpreted the language of, and the policies underlying, the Act. As the Sixth Circuit (and Judge Cudahy) recognized, the Act provides no textual support for the conclusion that Congress intended the interconnection agreement process to preempt pro-competitive state-law tariffing requirements, even those that facilitate new entry into local markets. To the contrary, the numerous provisions in the Act that specifically preserve pro-competitive state law suggest just the opposite. The Act's legislative history also provides no support for the Seventh Circuit's belief that Congress intended to preempt pro-competitive state laws simply because those laws utilize tariffs as an additional means of fostering local competition.

Review of the Seventh Circuit's decision is urgently needed. Pursuant to state laws intended to advance local competition, numerous state commissions have required incumbent carriers to make services available to competing carriers through tariffs. As demonstrated by the fact that the Public Service Commission of Wisconsin will be filing its own Petition, the Seventh Circuit decision to eliminate tariffs as a viable option not only creates a substantial and unwarranted intrusion on state regulatory authority, it imposes substantial harm to the competitive process by denying state regulators the ability to provide rapid access on predictable and reasonable terms, as state tariffs would otherwise allow. The Seventh Circuit's decision also encourages incumbents to delay negotiations in an effort to forestall the competition that Congress sought to ensure "as quickly as possible." H.R. Rep. at 89, *reprinted in* 1996 U.S.C.C.A.N. 10, 55.

Moreover, by creating a division among the Circuits, the Seventh Circuit has introduced more confusion and uncertainty into a system that has had more than its fair share of both. In many States (including Wisconsin), MCI's interconnection agreements with incumbent carriers specifically reference or incorporate those tariffs. The decision of the Seventh Circuit majority would eviscerate these critical provisions, fundamentally reworking existing interconnection agreements, and leaving carriers such as MCI that operate nationwide in the dark about the validity of tariff-incorporating provisions.

As this Court has recognized, the 1996 Act "profoundly affects a crucial segment of the economy worth tens of billions of dollars," *AT&T*, 525 U.S. at 397, and "fundamentally restructures local telephone markets," *id.* at 371. The Court should exercise its authority to restore

needed clarity to this important question regarding preemption of state regulatory authority under the 1996 Act and the role of state-law tariffs in promoting local telephone competition, and eliminate the anticompetitive incentives that the Seventh Circuit's decision has created.

I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS FROM THE SIXTH AND TENTH CIRCUITS, AS WELL AS THE FCC.

The Seventh Circuit's decision conflicts with the Sixth Circuit's decision in *Michigan Bell*. The Seventh Circuit majority found that requiring SBC to make services available via tariff "*has* to interfere with the procedures established by the federal act." Pet. App. 6a (emphasis in original). It found that the requirement places a "thumb on the scales" by requiring SBC to state its "reservation price" in the tariff, "so that bargaining begins from there. *Id.* The majority thus concluded that the tariffing requirement "enable[s] would-be entrants to bypass the federally ordained procedure." Pet. App. 7a.

By contrast, the Sixth Circuit held in *Michigan Bell* that the Act "recognizes that interconnection agreements are not the sole way to promote competition among local service providers, for it allows room for state regulation," and that "[t]he negotiation procedure under Section 252 of the Act is not the only way for the [state] Commission to order and regulate telecommunications." 323 F.3d at 359.

The Sixth Circuit reasoned that "Michigan's tariffs and the agreements negotiated pursuant to the Act work toward the common purpose of giving competing carriers a means of competing with incumbent local exchange carriers." *Id.* It

found that "allowing MCI to purchase under terms of [SBC's] tariffs will ensure that competitors are able to buy on the most favorable terms available in a given market." *Id.* It further found that, "[u]nder the system of cooperative federalism established by the Act, it is permissible for Michigan to maintain a tariff system alongside the agreements negotiated under the Act." *Id.* at 360. The Sixth Circuit concluded that, so long as "the interconnection agreement [between MCI and SBC] did not preclude MCI's placing . . . orders under [SBC's] tariff obligations," the Act does not preempt MCI's ability to order services from SBC's tariffs. *Id.* at 359. The Sixth Circuit's conclusion that state tariffs of this sort can comfortably coexist with the negotiation and arbitration procedure in the Act is flatly inconsistent with the Seventh Circuit's view that the two schemes are incompatible.[3]

The Seventh Circuit's decision also conflicts with the Tenth Circuit's decision in *U.S. West Communications*. In

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[3] In a prior case, the Sixth Circuit held that a state commission could not establish tariffing obligations that allow competing carriers to bypass completely the "entire interconnection process (with its attendant negotiation/arbitration, state commission approval, FCC oversight, and federal court review procedures)." *Verizon North, Inc. v Strand*, 309 F.3d 935 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 1649 (2003). In *Michigan Bell*, the Sixth Circuit held that the preemption analysis from *Verizon North* applied only in situations in which the state tariff would allow parties to bypass the entire interconnection agreement process altogether. *Michigan Bell*, 323 F.3d at 360. The preemption analysis from *Verizon North* is inapplicable in this context, because the Commission specifically found that the tariffs did "not create a complete regime" of interconnection that would allow carriers to "bypass" the § 252 process. Pet. App. 57a. Notably, SBC's Michigan affiliate filed a petition for rehearing *en banc* in *Michigan Bell*, in which it argued that the decision was inconsistent with *Verizon North*, but the Sixth Circuit denied that petition.

that case, the Tenth Circuit held that, when conducting an arbitration under the Act, a state commission may order an incumbent carrier to include provisions in an interconnection agreement that allow the competing carrier to take services from the incumbent carrier's tariffs. *See* 275 F.3d at 1250-51. Like the Seventh Circuit in this case, the district court in *U.S. West Communications* concluded that allowing the competing carrier to take services from the incumbent's tariff could "negatively impact the negotiation of interconnection agreements" because it would leave "little incentive for carriers to negotiate if they can simply opt in to a more favorable tariff than the state commission imposes." *Id.* at 1250 (quoting district court).

The Tenth Circuit disagreed. It found that, "[a]t least from the standpoint of a [competing carrier], an incentive remains to negotiate prices and terms that are more favorable than those set forth in an [incumbent's] existing tariffs[.]" *Id.* The Tenth Circuit further found that "[t]he tariff opt-in provision therefore does not diminish the negotiation process." *Id.*; *see also id.* (concluding that the tariff opt-in provision "ensures that a [competing carrier] will be able to obtain the most favorable prices and terms available, thereby allowing it to remain competitive in the local marketplace"). The Tenth Circuit thus expressly rejected the rationale that the Seventh Circuit majority adopted, namely, that allowing competing carriers to take services from tariffs places an impermissible "thumb on the scales" in the negotiation process and undermines "the contractual route" to reaching agreement contemplated by the Act. Pet. App. 6a.

The Seventh Circuit's decision also conflicts with the FCC's interpretation of the Act. In the *Texas Preemption Order*, the FCC was asked to preempt requirements imposed by the Public Utility Commission of Texas (the "Texas

PUC") that required SBC's affiliate Southwestern Bell to make its services available for resale via tariff. *Texas Preemption Order* ¶ 191; Tex. Rev. Civ. Ann. art. 1446c-0 § 3.453 (West Supp. 1996).

One challenged provision allowed certain competing carriers to purchase local service for resale from Southwestern Bell's tariff at a five percent discount from Southwestern Bell's retail rate – far less than the discount rate the Act requires. *Texas Preemption Order* ¶¶ 131, 133. The Texas PUC argued that federal law did not preempt the provision because "[t]he five percent discount tariff operates on a 'parallel track' with [the Act] and provides an optional, alternative procedure for competitors to obtain local exchange services for resale. The state tariff does not supersede or negate the federal provisions." *Id.* ¶ 132 (alterations in original).

The FCC agreed and declined to preempt the Texas statute. The FCC found that "there is nothing in [the Texas statute] that prohibits [competing carriers] from seeking to obtain flat rated local exchange services for resale from [Southwestern Bell] pursuant to the negotiation and arbitration provisions contained in sections 251 and 252 of the Act." *Id.* ¶ 138. The Texas statute merely "provides an *optional* resale avenue that does not interfere with the ability of [carriers] to invoke sections 251 and 252 of the Act." *Id.* ¶ 139 (emphasis added).

Notably, the FCC acknowledged the principle relied on by the Seventh Circuit that conflict preemption exists when a state statute "'interferes with the methods by which the federal statute was designed to reach [its] goal.'" *Id.* ¶ 50 (*citing Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 103 (1992)). The FCC correctly concluded,

however, that this principle does not apply to state tariffing regulation, so long as the state law does not interfere with competing carriers' ability to invoke the Act's procedures. *Id.* ¶ 15 (finding that the Texas statute "presents an option that [competing carriers] may elect under state law, but in no way interferes with a carrier's ability to invoke the negotiation and arbitration procedures in the [Act]").

II. THE SEVENTH CIRCUIT IS INCORRECT.

The Seventh Circuit's conclusion that the Act preempts state-law tariffing requirements is incorrect for several reasons.

First, there is no textual support for a claim that the Act preempts state-law tariffing requirements; indeed the text refutes any such claim. Section 251(d)(3) of the Act specifically preserves any "regulation, order, or policy of a State commission that . . . establishes access and interconnection obligations of local exchange carriers" so long as the obligations are "consistent with" and do not "substantially prevent implementation of the requirements" or the "purposes" of the Act. 47 U.S.C. § 251(d)(3). This describes the Commission's Order almost exactly – it is a state "regulation, order, or policy" that "establishes access and interconnection obligations for local exchange carriers." Because the Commission's Order does not purport to displace the interconnection agreement process, it is "consistent with" and does not in any way "prevent implementation" of the requirements or the purposes of the Act.

The Act's other non-preemption provisions confirm the Seventh Circuit's error. By including Section 261 and Section 601(c) in the Act, Congress provided unambiguous

direction to *avoid* precisely the expansive implied preemption analysis used by the Seventh Circuit majority here.

Second, the Seventh Circuit was wrong to conclude that the existence of the tariff would "interfere with the procedures established by the federal Act," by "requiring one of the parties to the negotiation, the local phone company, but not the other, the would-be entrant, to state its reservation price." Pet. App. 6a. As Judge Cudahy correctly recognized, the existence of the tariff does not "somehow bludgeon [SBC] into revealing negotiating secrets, like reservation price, that it would otherwise be able to protect, or into otherwise bargaining from an inferior position." Pet. App. 13a. Under the FCC's regulations, for example, SBC is *required*, when negotiating an interconnection agreement with a competing carrier, to provide the competing carrier with "cost data that would be relevant to setting rates if the parties were in arbitration." 47 C.F.R. § 51.301(c)(8)(ii) (2003). Thus, as a practical matter, requiring SBC to file a tariff containing the TELRIC price does not give competing carriers any more information about SBC's "reservation price" than they are already entitled to receive under federal law. Moreover, under the Act, any entrant who is unhappy with the bargaining process can simply ask the Commission to arbitrate, thereby invoking "a procedure virtually identical to what is going on unilaterally during the tariffing process at issue." Pet. App. 13a. It is not surprising, therefore, that SBC never made this "reservation price" argument to the Seventh Circuit – that court (erroneously) spun it from whole cloth.

More broadly, the majority's concerns about "reservation price" and the incumbent's bargaining position fundamentally misconceive the nature of this negotiation

process. As the FCC recognized, "the negotiation process contemplated by the 1996 Act bears little resemblance to a typical commercial negotiation. Indeed, the entrant has nothing that the incumbent needs to compete with the entrant, and thus little to offer the incumbent in a negotiation." *Local Competition Order* ¶ 134. Negotiations under the 1996 Act occur against a backdrop of detailed federal and state regulatory requirements, the most important of which for present purposes is TELRIC. *See* 47 C.F.R. § 51.505 (2003). Because state commissions must set prices for network elements according to the TELRIC methodology, *see id.*, incumbents and new entrants both know in advance how those prices will be determined if they do not reach agreement during the negotiation process. The majority was thus wrong, as Judge Cudahy recognized, to view the negotiation phase as providing "a purely 'free market' solution'" for setting prices that would be disrupted by the State's provision of a "regulatory solution."

Third, the history and purpose of the Act do not support the Seventh Circuit's decision. Congress was fully aware when it passed the Act that several States had already passed state-specific laws aimed at opening local markets to competition, *see* S. Rep. at 5 (noting that "[s]everal States (such as New York, California, and Illinois) have taken steps to open the local networks of telephone companies"), and Congress expressly sought to build on these existing state efforts. If Congress had intended to preempt those state laws, it could have done so expressly, as it did with respect to state laws that restrict competition. *See* 47 U.S.C. § 253. Instead, Congress not only enacted the provisions preserving state law described above, it made clear that those provisions were intended to "prevent[] affected parties from asserting that the [Act] impliedly pre-empts other laws." Conf. Rep. at 201, *reprinted in* 1996 U.S.C.C.A.N. 124, 215.

Fourth, no rationale underlying the Act supports the Seventh Circuit's decision to accept SBC's "facial" challenge to the tariff. As Judge Cudahy recognized, because SBC challenged the requirement that it file a tariff in the first place (as opposed to the right of any particular competing carrier to access the tariff), "the only issue is whether there is any set of facts under which the [Commission] can require tariffing." Pet. App. 16a; *see California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987) (finding that a "facial challenge" to an agency's authority can be sustained only if "there is no possible set of conditions" under which the agency can exercise its authority). To defeat such a facial challenge, there need merely be "a possible set" of conditions under which the agency can exercise its authority in a way that is "not in conflict with federal law." *California Coastal*, 480 U.S. at 593.

Such a facial challenge to a state commission's authority to require tariffs clearly fails under the Act. As the Sixth Circuit and the FCC have recognized, whether competing carriers may take services from incumbent carriers' tariffs should not be determined by a *per se* rule against the use of tariffs, but rather by the terms of the parties' interconnection agreements. *See In re Petition of WorldCom, Inc.*, 17 F.C.C.R. 27039 ¶ 602 n.2001 (2002) ("*FCC Arbitration Order*") ("We expect that whether a party may purchase a service out of a tariff when it is also offered in the interconnection agreement would depend on the language of the agreement."); *Michigan Bell*, 323 F.3d at 359 (holding that MCI may order services from SBC's tariffs so long as "the interconnection agreement [between MCI and SBC] did not preclude MCI's placing . . . orders under [SBC's] tariff obligations").

The Act allows parties to negotiate terms in interconnection agreements "without regard" to most of the Act's requirements. 47 U.S.C. § 252(a)(1). Thus, as the FCC found, "[c]onsistent with the [Act's] recognition of the parties' right to negotiate interconnection agreements, the parties are certainly free to agree that services will be provided pursuant to tariffs filed with the appropriate commission." *FCC Arbitration Order* ¶ 602. The Seventh Circuit committed a fundamental error by accepting SBC's facial challenge to the Commission's Order, and finding the tariffing requirement preempted, irrespective of the terms of any interconnection agreements.

Fifth, the Seventh Circuit's professed belief that "[a]n appeal from the commission's resolution of an entrant's challenge to a tariff would go to a state court, rather than a federal court," is wrong. Pet. App. 6a. This Court recently held that federal court jurisdiction to hear claims that state commission decisions violate the Act is not limited to decisions arbitrating and approving interconnection agreements. *Verizon Maryland v. Public Serv. Comm'n*, 535 U.S. 635, 641-44 (2002). Thus, as Judge Cudahy noted, "at the end of either process, negotiation/arbitration or tariffing, an aggrieved [SBC] can challenge the result in federal court." Pet. App. 13a.

Finally, the Seventh Circuit all but ignored the presumption that federal statutes leave in place state regulatory authority to the extent possible. The Seventh Circuit's error is particularly pronounced in this case, where the actions of the Wisconsin Commission fall within the boundaries of traditional state regulatory authority, and where Congress was explicitly trying to build on, not

eradicate, existing state efforts to introduce competition into these markets.

III. REVIEW IS URGENTLY NEEDED BECAUSE THE SEVENTH CIRCUIT'S DECISION, IF LEFT UNDISTURBED, WILL FACILITATE INCUMBENT EFFORTS TO DELAY NEW ENTRY AND UNDERMINE THE MARKET-OPENING ROLE THAT CONGRESS LEFT FOR STATE LAW.

The dispute presented by this Petition is not merely theoretical. The decision below directly and substantially impairs the ability of MCI and other competing carriers to operate their businesses and fulfill the congressional goal of competition in local telephone markets. It does so by restricting the ability of state regulators to remove the single biggest obstacle to new entry, namely, delay and intransigence on the part of local incumbents.

As many state regulatory authorities have concluded, tariffs are often an effective tool to promote competition precisely because they limit delay. The Seventh Circuit's decision nullifies this important regulatory mechanism. As a result of that decision, every incumbent has an incentive to force the long, nine-month process of negotiation and arbitration (followed by further delay for appellate review) on every interconnection request that differs even slightly from a pre-existing contract. Those time delays are unnecessary in many (if not most) cases, and they severely restrict the ability of new entrants to compete.

The present case illustrates the potential for abuse. As the Wisconsin Commission noted in its order, SBC proposed a "voluntary" amendment to its interconnection agreements,

purportedly to make UNE-P and EELs available to new entrants, as required. Pet. App. 57a-58a. The Commission found, however, that "many of the terms and conditions [SBC] has proposed in its 'voluntary' offerings are simply unreasonable or amount to unacceptable overreaching. They either impede the quality or reliability of the offering, or seek to [impose a] throttlehold on [new entrants'] participation in regulatory proceedings." *Id.* Forcing new entrants to negotiate with SBC to eliminate these unreasonable terms and conditions would directly impede their entry and would delay the onset of local competition. By contrast, by ordering SBC to provide UNE-P and EELs to all new entrants via tariff, the Commission made these services available more quickly to all entrants, without requiring lengthy negotiations just to get what the law requires.

By eliminating the ability of state regulators to use tariffs in this manner to supplement the procedures provided by the 1996 Act and guard against incumbent intransigence, the Seventh Circuit threatens to undo state efforts to foster competition and to reward exactly the sort of resistance that Congress hoped to forestall.

The Seventh Circuit's decision is also tremendously destabilizing, particularly in light of the conflicting decisions of the Sixth and Tenth Circuits. MCI, for example, is a party to interconnection agreements around the country that, either expressly or by implication, allow MCI to obtain services via the incumbents' state-law tariffs. These include MCI's interconnection agreement with SBC in Wisconsin. Yet under the Seventh Circuit's ruling, the enforceability of these provisions is, at a minimum, open to doubt.

Moreover, the confusion caused by the decision below is not limited to the enforceability of existing contracts. MCI

routinely arbitrates new interconnection agreements with incumbent carriers around the country in which the incumbents, either voluntarily or through arbitration, provide services via tariff. *See, e.g., FCC Arbitration Order* ¶ 602 (describing agreement between the parties that certain services "will be provided pursuant to tariffs filed with the appropriate commission"). But the Seventh Circuit's decision creates confusion about the enforceability of even these freely-negotiated provisions. Allowing such uncertainty over the rules of local competition to continue is antithetical to Congress' goal of stimulating competition "as quickly as possible." H.R. Rep. at 89, *reprinted in* 1996 U.S.C.C.A.N. 10, 55.

Finally, clarification from this Court is needed to avoid years of piecemeal litigation over the many state laws and state commission orders that require incumbent carriers to make services available by tariff. As noted above, many States have enacted laws similar to Wisconsin's that require incumbents to publish tariffs. *See supra,* p. 7 and n.1. Using the Seventh Circuit's decision as a guide, incumbents are sure to bring challenges to these statutes and commission orders around the country. Clarification by this Court now will avoid years of uncertain and confusing litigation over this important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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